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No. 92-1168

In The
Supreme Court of the United States
October Term, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER

IRWIN VENICK
(Counsel of Record)
WOODS & VENICK
A Professional Law Assn.
121 17th Avenue, South
Nashville, TN 37203
(615) 259-4366

LARRY WILSON
110 30th Ave. N., Ste. 1
Nashville, TN 37203
(615) 320-5940

ROBERT BELTON
REBECCA L. BROWN
ANNE M. COUGHLIN
Vanderbilt Law School
Nashville, TN 37240
(615) 322-2615
Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

1. Is a plaintiff in a sexual harassment case also required to prove, in order to prevail, that she suffered serious psychological injury when the Trial Court has found that she was offended by conduct that would have offended a reasonable person in the position of the plaintiff?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below were Petitioner, Teresa Harris, and Respondent, Forklift Systems, Inc. Forklift Systems, Inc., is a private corporation organized under the laws of the State of Tennessee. Forklift has no parent nor subsidiary.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported, but is reproduced in the Appendix to the Petition for a Writ of Certiorari, at A1-A3.

The opinion of the United States District Court for the Middle District of Tennessee has not been reported but is reproduced in the Appendix to the Petition for Writ of Certiorari App. A-4.

The Report and Recommendation of the magistrate, which constitutes the findings of fact and conclusions of law of the district court is reproduced in the Appendix to the Petitioner For a Writ of Certiorari at A5-A25.¹

JURISDICTION

This Court has jurisdiction pursuant to 102 Stat. 662, 28 U.S.C. § 1254(1) (1988). The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 17, 1992 (Pet. for Cert. App. A5), No Petition for Rehearing was filed. A timely Petition for Certiorari was filed on December 15, 1992, and this Court granted certiorari on March 1, 1993.

¹ The Appendix to the Petition for Writ of Certiorari is cited as "Pet. for Cert. App." The Joint Appendix filed with this Brief is cited as "J.A. ____".

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e *et seq.*, provides, in pertinent, part as follows:

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner, Teresa Harris, commenced this action on July 7, 1989, in the United States District Court for the Middle District of Tennessee. She sued respondent, Forklift Systems, Inc., ("Forklift" or the "Company"), alleging that she had been discriminated against because of her sex in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e, *et seq.*

Judge John T. Nixon referred the case to Magistrate Kent Sandidge for trial, report and recommendation.² (Pet. for Cert. App. A-5). Ms. Harris proceeded to trial

² Judge Nixon referred the case to the Magistrate pursuant to § 706(f)(5) of Title VII, 42 U.S.C. § 2000e-5(f)(5), Rule 53, F. R. Civ. Proc., and Local Rules of the Middle District of Tennessee. (Pet. for Cert. App. A-5).

under two theories, only one of which – sexual harassment – is before this Court.³ She alleged that she had been constructively discharged by Forklift because its President and Chief Executive Officer, Charles Hardy, had created and condoned a sexually offensive hostile work environment for female employees, the result of which caused her physical illness, anxiety and the need for medical care. Ms. Harris sought declaratory and injunctive relief including reinstatement and back pay. (J.A. 6-7).

The case was tried before the magistrate on July 23, 1990. The magistrate filed his report and recommendation on November 27, 1990.

Ms. Harris was employed by Forklift from April 22, 1985, until October 1, 1987. Her job included responsibility as a rental manager for leased equipment and as coordinator for the sales department. (Pet. for Cert. App. A-6). During the time that Ms. Harris was employed as a rental manager at Forklift, the Company employed five other managers. Of the six managerial employees, four were male, and two were female. The female managers were Ms. Harris and Kathy Kornell, who was the Office Manager and the daughter of Forklift's President, Charles Hardy. (J.A. 22). Mr. Hardy was Teresa Harris' supervisor.

The magistrate found that Mr. Hardy "is a vulgar man [who] demeans the female employees at his work place." (Pet. for Cert. App. A-14). He concluded that Mr.

³ Petitioner also pressed a disparate treatment claim (J.A. 20-21), which was dismissed upon recommendation of the magistrate. (Pet. for Cert. App. A-7).

Hardy subjected Ms. Harris to "a continuing pattern of sex-based derogatory conduct" (*Id.* at A-8), including "continuous inappropriate sexual comments," which ranged from the "inane and adolescent" to the "truly gross and offensive" (*Id.* at A-18, A-19). He found that Mr. Hardy's "demeaning sexual comments," were directed at Ms. Harris as well as at other female employees of Forklift, but not at the Company's male employees (*Id.* at A-17).

The specific evidence on which the magistrate based his finding that Ms. Harris was the object of a continuing pattern of sex-based derogatory conduct included the following:

(a) Mr. Hardy stated to Ms. Harris in the presence of other employees at Forklift, "You're a woman, what do you know," on a number of occasions and also stated, "You're a dumb-ass woman," (J.A. 45, 46). Other male employees also disparaged Ms. Harris by making the same remark. (J.A. 45).

(b) Mr. Hardy, on a number of occasions, stated to Ms. Harris, in the presence of other employees of Forklift, "We need a man as the rental manager." (J.A. 44-45).

(c) Mr. Hardy, in front of a group of other employees and a customer of Forklift, stated to plaintiff, "Let's go to the Holiday Inn to negotiate your raise." (J.A. 48).

(d) Mr. Hardy asked Ms. Harris and other female employees, but not male employees of Forklift, to retrieve coins from his front pants pocket. As Ms. Harris testified:

"He would say, Teresa, I have a quarter way down there. Would you get that out of my [front] pocket." (J.A. 48-49).

(e) Mr. Hardy threw objects on the ground in front of Ms. Harris and other female employees of Forklift, but not male employees, and asked them to pick the objects up, thereafter making comments suggesting how they should dress to expose their breasts. (J.A. 50-51).

(f) Mr. Hardy told female employees that he had heard that eating corn would make their breasts grow. (J.A. 50-51).

(g) Mr. Hardy commented with sexual innuendos about clothing worn by Ms. Harris and other female employees of Forklift but not male employees. (J.A. 51-52).

(h) Mr. Hardy told Ms. Harris on a number of occasions that she had a "racehorse ass," (J.A. 51), and said that she could not wear a bikini "because your ass is so big, if you did there would be an eclipse and nobody could get any sun." (J.A. 51-52).

(i) Mr. Hardy suggested that he and Ms. Harris should start "screwing around" even though he knew that she had been recently married. (J.A. 47).

Rather than dispute these statements and actions, Forklift took the position at trial that they were only "jokes" and were not taken seriously by other female employees. Three female clerical employees testified that they did not take the "coin" behavior seriously. (Pet. for Cert. App. A-11). The magistrate, however, found that these three clerical employees were conditioned to accept denigrating behavior from Mr. Hardy. (*Id.* at A-19).

Both Mr. Hardy and David Thompson, a former Forklift employee, acknowledged the offensiveness of Mr. Hardy's behavior. Ms. Harris' undisputed testimony is that Mr. Hardy acknowledged that he would not like men to talk to his wife or daughter⁴ the way he (Hardy) spoke to Ms. Harris (J.A. 98). David Thompson acknowledged that he wouldn't put up with a man talking to his wife in the sexually demeaning manner that Mr. Hardy spoke to Ms. Harris. (J.A. 233).

By the middle of 1987, Hardy's offensive behavior had made Ms. Harris anxious and emotionally upset. The magistrate found that Ms. Harris "was good at her job." (Pet. for Cert. App. A-11) However, because of Mr. Hardy's unwelcomed, vulgar and sexually demeaning conduct, by August, 1987, Ms. Harris did not want to go to work; she cried frequently; she began drinking heavily outside of work; and the relationship with her children became strained. (*Id.* at A-10). These findings are supported by Ms. Harris' unrebutted testimony about the effects of Mr. Hardy's conduct on the conditions of her employment:

"It embarrassed me. . . . The comments about how I looked embarrassed me, but the comments about my ability to do my job and that I was stupid and I was dumb devastated me. I hated walking in there. He embarrassed me. Everybody made fun of me because Charles Hardy did that. And I was supposed to laugh about it, and it wasn't funny." (J.A. 52).

"I cried all the time. I was having shortness of breath. I wasn't sleeping at all. I was drinking heavily. I drank a lot. I would get drunk every night so I would go to sleep so I could get up and go to work the next day, and I hated it. I shook. I would sit in my office and I would shake. I hate it. I just hated it." (J.A. 52-53).

"I went to see my doctor. He ran tests on me. He did an EKG and he did chest x-rays because of the breathing problem, and there was nothing physically wrong with me. He attributed it to all the anxiety and gave me tranquilizers and sleeping pills." (J.A. 52).

"I was ugly to my children. My children would call me and I would be ugly to them and I would say terrible things to them and hang up on them. I always did that for Mr. Hardy's benefit because he made remarks to me about that too: 'Your kids call all the damn time. . . .'" (J.A. 56).

Mr. Hardy's "comments about . . . how I looked embarrassed me, but the comments about my ability to do my job and that I was stupid and I was dumb devastated me. I hated walking in there." (J.A. 52). Ms. Harris felt that Mr. Hardy's vulgar and demeaning remarks made her into a "joke" "[t]o everybody at Forklift Systems" (J.A. 45-46) and that "[e]verybody made fun of me because Charles Hardy did that." (J.A. 52).

On August 18, 1987, after enduring more than two years of Mr. Hardy's sex-based epithets, innuendos and other sexually demeaning conduct, Ms. Harris met with Mr. Hardy to complain about his abusive and harassing behavior, intending to submit her resignation. Without

⁴ The reference to "Sandra" in the transcript is to Mr. Hardy's wife; the reference to Kathy is to his daughter.

Mr. Hardy's knowledge, Ms. Harris taped a portion of their conversation. During the meeting Mr. Hardy admitted that he had engaged in the conduct Harris complained of, but told her that he was only "joking", that his sexually offensive conduct only reflected his effort to treat her "like one of the boys." (J.A. 156). He promised to stop engaging in the offensive behavior. Relying upon Mr. Hardy's assurances that he would stop his offensive conduct, Ms. Harris agreed not to resign. (J.A. 58).

Mr. Hardy's promise, however, was shortlived. Within a few weeks after his August, 1987, meeting with Teresa Harris, Mr. Hardy again began directing sexually offensive and harassing remarks towards Ms. Harris. A particularly egregious episode led Ms. Harris to terminate her employment with Forklift. As she explained in her testimony:

[I]n September of 1987, I told him that I was working on a multiple lease deal at ASI, which is Aladdin Synergetics, and I really felt like we were going to get that order. He said, "What did you do, Teresa, promise the guy at ASI bugger Saturday night."

Ms. Harris understood, and the magistrate found, that his "bugger" remark implied that Ms. Harris had promised to provide sexual favors in exchange for a business deal with a customer. (Pet. for Cert. App. A-18); (J.A. 58-59). As a result of this conduct, Ms. Harris terminated her employment with Forklift on October 1, 1987. (J.A. 60).

The magistrate found that although female clerical employees tolerated Hardy's behavior, viewing it as the norm and as joking, to Ms. Harris his sexual comments

"were especially painful when [he] would make demeaning sexual comments to her in front of her co-workers." (Pet. for Cert. App. A-14). The magistrate found that Mr. Hardy's sexual comments offended Ms. Harris and would have offended a reasonable woman in her position. He did not find, however, that the behavior was sufficient to interfere with Ms. Harris' work performance nor so severe as to seriously affect her psychological well-being. (Pet. for Cert. App. A-19). Accordingly, under the authority of *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987), the magistrate recommended dismissal of Ms. Harris' hostile environment claim under Title VII.

Relying upon the finding that Hardy's behavior was merely annoying, the magistrate also recommended dismissal of Ms. Harris' claim of constructive discharge. The magistrate held that Ms. Harris failed to prove that Forklift intended that Ms. Harris leave her job and that her leaving was not foreseeable. (Pet. for Cert. App. A-21, A-22).

Ms. Harris filed objections to the Magistrate's Report and Recommendation. None were filed by Forklift. On February 4, 1991, the district court summarily rejected her objections, adopted the Magistrate's Report and dismissed the action.⁵ (Pet. for Cert. App. A-4).

⁵ The Magistrate's Report constitutes the district court's findings of fact and conclusions of law under Rules 52 and 53(e)(2), Fed. R. Civ. Pro., because the district court adopted the report and recommendation without modifications. Thus, reference to the magistrate in this brief is effectively reference to the district court.

The Sixth Circuit, in an unpublished opinion issued on September 17, 1992, summarily affirmed the decision of the district court. (*Id.* at A-2, A-3).

SUMMARY OF THE ARGUMENT

This case turns on whether Title VII requires a sexual harassment plaintiff to prove that he or she suffered serious psychological injury in order to establish liability for a hostile working environment. The case was tried before a magistrate, who made findings of fact in which he found that Teresa Harris was the object of a continuing pattern of derogatory sex-based conduct caused by Charles Hardy, the president of Forklift. The magistrate found that Ms. Harris was offended by Mr. Hardy's conduct and that the conduct would have offended a reasonable person in her position. The magistrate's factual findings were not objected to by the employer.

In *Meritor Savings Bank v. Vinson*, this Court held that Title VII prohibits employers from maintaining work places in which sex-based conduct is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Even though Ms. Harris was the object of a continuing pattern of sex-based conduct that offended her and would have offended a reasonable person in her position, her hostile environment and constructive discharge claims were dismissed because the Magistrate felt that Ms. Harris had not suffered serious psychological injury.

In the Sixth Circuit, serious psychological injury is a necessary element of proof in a hostile environment claim

based on sex. This requirement does not comport with the statutory purpose of Title VII to eliminate discriminatory practices from the workplace nor is it consistent with this Court's decision in *Meritor*. The psychological injury requirement imposes upon a sexual harassment plaintiff the burden of exposing herself to offensive workplace behavior to the point that she is psychologically injured in order to make out a claim for equitable relief under Title VII.

A hostile work environment claim should be based on consideration of those facts which describe the pervasiveness or severity of the offensive sexual conduct. The conduct can then be viewed from the perspective of a reasonable person in the plaintiff's position (a reasonable victim) to determine if the conduct is so severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. This perspective will both promote the purpose of Title VII to eliminate discriminatory workplace conduct and protect employers from sensitive employees who make unreasonable complaints about sexual conduct in the workplace. Alternatively, the victim's testimony and other proof regarding the workplace conduct can be considered without regard to any reasonableness standard.

Applying either analysis to the magistrate's factual findings requires reversal of the decisions below dismissing Ms. Harris' hostile environment claim. The magistrate's factual findings support the legal conclusion that the conduct to which Ms. Harris was exposed was both severe and pervasive and altered her working conditions. Ms. Harris' constructive discharge claim was also dismissed because of the magistrate's determination that Mr.

Hardy's behavior was "not that bad". Because dismissal of Ms. Harris' constructive discharge claim was tied directly to the dismissal of her hostile environment claim, she should be granted judgment on her constructive discharge claim as well.

ARGUMENT

I. PROOF OF SERIOUS PSYCHOLOGICAL INJURY IS NOT NECESSARY TO ESTABLISH HOSTILE ENVIRONMENT LIABILITY ON THE BASIS OF SEX UNDER TITLE VII.

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin". 78 Stat. 253, 42 U.S.C. § 2000e-2(a)(1). In 1986, this Court in *Meritor* held that the phrase "terms, conditions or privileges" is not limited to economic or tangible discrimination, and, therefore, a hostile work environment on the basis of sex could be a violation of Title VII. In a unanimous decision, the Court announced that Title VII invests in employees the right to work in an "environment free from discriminatory intimidation, ridicule and insult." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

The standards established in *Meritor* for evaluating hostile environment claims on the basis of sex are whether the conduct complained of was "unwelcome"

and "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Savings Bank v. Vinson*, 477 U.S. at 65 (1986). Whether these standards have been met is to be based upon consideration of the totality of the circumstances. (Citing EEOC, *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11(b) (1992).)

Based on the *Meritor* totality of the circumstances test, the courts generally agree that a plaintiff is entitled to relief in a hostile environment case if five elements⁶ are established:

- (1) The employee belongs to a protected group;
- (2) The employee was subjected to unwelcomed sexual harassment, that is, sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature that is unsolicited or uninvited;
- (3) The harassment complained of was based on sex, that is, but for the fact of the employee's sex, the employee would not have been the object of the harassment;
- (4) The harassment complained of affected a term, condition, or privilege of employment, that is, the harassment created an abusive or hostile working environment; and
- (5) Respondent knew or should have known of the harassment and failed to take prompt remedial action. See *Staton v. Marion County*,

⁶ The five elements were initially enunciated by the Eleventh Circuit in *Henson v. City of Dundee*, 682 F.2d 897 (1982).

868 F.2d 996, 998 (8th Cir. 1989); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3rd Cir. 1990); *Henson v. City of Dundee*, 682 F.2d 897, 903-905 (11th Cir. 1982).

Of these five elements, there is a direct conflict among the courts of appeal on whether a plaintiff must actually suffer serious psychological injury to satisfy the fourth element requiring that the conduct create an abusive or hostile working environment.⁷

The decision of the Sixth Circuit in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987), held that actual proof of serious psychological injury is required. In that case, the Sixth Circuit determined that the test articulated in *Meritor* to establish whether harassment created a hostile working environment must be proved by conduct which:

... had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile or offensive work environment that effected seriously the psychological well-being of the plaintiff.

Id. at 619.

Based solely on *Rabidue*, the magistrate dismissed Ms. Harris' hostile environment claim. Although he found that Mr. Hardy's conduct offended Ms. Harris and would offend a reasonable woman in her position, he concluded the proof was insufficient, as a matter of law,

⁷ No issue is before the Court as to the other four elements because the magistrate found the proof to have satisfied those elements. (Pet. for Cert. App. A-17).

to establish that it had "so poisoned" the workplace at Forklift, "as to be intimidating or abusive to [Ms. Harris]" in that she had suffered serious psychological injury as a result of that conduct. (Pet. for Cert. App. A-19).

Ms. Harris submits there are at least five reasons why proof of serious psychological injury should not be required to satisfy *Meritor*'s standard that charged sexual harassment is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. First, neither the language of Title VII nor its legislative history requires proof of serious psychological injury. Second, *Meritor* did not require proof of serious psychological injury. Third, *Rabidue* is based on a misinterpretation of *Meritor*. Fourth, the Equal Employment Opportunity Commission (EEOC) has rejected *Rabidue*'s requirement of serious psychological injury. And finally, a rule that requires a plaintiff to have actually suffered serious psychological injury is inconsistent with the objectives of Title VII.

A. Neither the Language of Title VII nor its Legislative History Requires Proof of Serious Psychological Injury.

Title VII makes it unlawful for employers "to discriminate with respect to the *terms, conditions and privileges of employment*." 78 Stat. 253, 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Neither the phrase "terms, conditions, and privileges of employment" nor the term "discriminate" is defined in the Act. This Court, however, has construed the phrase "terms, conditions and privileges"

to mean the contractual relationship of employment. *Hishon v. King and Spalding*, 467 U.S. 69, 75-76 (1984).

In construing a statute it is appropriate to assume that the ordinary meaning of the language that Congress employed accurately expresses its legitimate purpose. *Daniel v. Paul*, 395 U.S. 298, 308 (1969) (the words "place of recreation" as used in the 1964 Civil Rights Act should be given their usual meaning); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977) (the words "pattern and practice" as used in the 1964 Civil Rights Act are not terms of art and reflect only their usual meaning).

In Title VII, the words used by Congress, "terms, conditions and privileges," given their ordinary meaning, all relate to the employment relationship rather than the reaction an employee may have to circumstances in the workplace: the word "term" means "a limited or definite extent of time" [Webster's New Third International Dictionary, p. 2358] (1976); the word "conditions" means "something established as a requisite for doing something else" and, additionally, "attendant circumstance; the existing state of affairs" (*Id.* at 423); the word "privileges" means "a right or immunity granted as a peculiar benefit, advantage or form" (*Id.* at 1805). Each word chosen by Congress expresses an aspect of the employment relationship rather than the reaction of an employee to that relationship.

The Court has broadly construed the term "discriminate," as evincing a congressional intent to "strike at the entire spectrum" of discrimination on the basis of sex in

the employment relationship. *Meritor Savings Bank v. Vinson*, 477 U.S. at 64 (1986) (citations omitted).

The term "to discriminate" indicates that Congress intended to focus on the acts or conduct of the alleged discriminator, not the result of the discrimination or the reaction of the victim of the discrimination. As explained by the Court, discrimination simply means conduct of an employer which treats some individuals less favorably than others because of race, sex, religion, or national origin. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n.15 (1977)).

The accepted meaning of these words, in the context of the purpose of Title VII to eliminate discrimination in employment, therefore, naturally leads to a consideration of conduct or behavior giving rise to the alleged workplace discrimination: in this case, those facts descriptive of the conduct alleged to constitute a sexually hostile work environment, rather than an employee's psychological reaction to the offensive conduct.

B. Meritor Does Not Require Proof of Serious Psychological Injury.

The test of hostile environment liability adopted by this Court in *Meritor* does not require proof of serious psychological injury by the victim of sexual harassment. *Meritor* addressed two elements of a hostile environment claim. First, conduct of a sexual nature must be unwelcome. *Meritor Savings Bank v. Vinson*, 477 U.S. at 68 (1986). Second, sexual harassment must be sufficiently

severe or pervasive to alter the conditions of the [victim's] employment and create an abusive working environment. *Id.* at 67.

The rationale for the first requirement of the test, that sexual conduct be unwelcome, is to distinguish between consensual conduct and that which is uninvited and, thereby, potentially actionable.⁸ *Id.* at 68. As defined by the Eleventh Circuit, conduct is unwelcome under Title VII if an employee "did not solicit or invite it and in the sense that the employee regarded the conduct as undesirable or offensive." *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982); accord, *Burns v. McGregor Electronic Ind., Inc.*, 61 FEP Cases (BNA) 592, 595 (8th Cir. March 30, 1993).

Whether conduct is unwelcome involves some proof that the sexual behavior was offensive but only in the sense that an employee was motivated to demonstrate that it was uninvited. *Barnes v. Costle*, 561 F.2d 983, 999 (D.C. Cir. 1972). Proof on the issue of unwelcomeness may address how the employee complaining of the sex-based workplace harassment felt about the conduct and/or how the employee voiced his or her objections to the harassment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 67-69 (1986); EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, (1989-91 Transfer Binder) CCH Employment Practices, ¶5258 at 6924 (March 19, 1990). This proof, in turn, will necessarily involve determination

⁸ Men and women spend a major portion of their adult lives in the workplace where sexual attraction between employees may, and does, arise. See, Barbara A. Gutek, *Sex In The Workplace*, pp. 1-4 (1985).

of whether the conduct was truly uninvited or offensive. However, as with this Court's consideration of unwelcomeness in *Meritor*, the seriousness of psychological injury, if any, suffered by a harassment victim is not a necessary element for consideration of this issue. *Meritor Savings Bank v. Vinson*, 477 U.S. at 67-69 (1986).

Similarly, the determination that conduct is severe or pervasive, does not turn on the psychological reaction the victim has to the conduct, but rather on analysis of the conduct itself. Severity or pervasiveness addresses the egregiousness of the harasser's conduct or how it infects the workplace in which the plaintiff works.⁹ In *Meritor*, conduct characterized as "criminal conduct of the most serious nature" was found actionable while the Court observed that the "mere utterance of a racial epithet" would not be considered sufficient to alter the condition of employment to create a hostile work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986). The severity of conduct will vary with how "bad" it is perceived to be: whether it is serious or trivial. Compare *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988) (male members of road construction crew "incessantly" referred to female crew members as "fucking flag girls", "repeatedly" asked female crew members to engage in sex acts,

⁹ The words chosen by this Court to express the test for hostile environment liability direct attention to the workplace conduct rather than the degree of reaction of the victim. The word "severe" means "of a great degree or harmful or undesirable effect [Webster's New Third International Dictionary, p. 2081] (1976), while the word "pervasive" means "that which pervades or tends to pervade", the word "pervade" meaning "to become diffused throughout". (*Id.* at 1688).

"frequently" mooned female crew members, and would "rub the females' thighs and breasts") with *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1st Cir. 1990), (Co-worker "bumped" victim, peeped at victim's "privates" in the restroom and "hung around him a lot.") However, even innocuous conduct ("a mere epithet") may become severe or pervasive as it is repeated by the perpetrator or echoed by others in the workplace. *Risinger v. Ohio Bureau of Workers Compensation*, 883 F.2d 475 (6th Cir. 1989).

The determination that conduct is severe or pervasive, however, does not turn on the psychological reaction the victim has to the conduct, but rather on an analysis of the conduct in its entirety.

C. *Rabidue is Based on a Misinterpretation of Meritor.*

The Sixth Circuit's requirement that, to be actionable, sexual conduct must be sufficient to and actually cause serious psychological injury results from a misinterpretation of *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) and its citation by this Court in *Meritor*. See *Meritor Savings Bank v. Vinson*, 477 U.S. at 65-66 (1986).

Reference to the psychological well-being of the victim was first mentioned by the Fifth Circuit in determining that a racially hostile work environment could be actionable under Title VII. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). In describing the parameters of Title VII's protection, the

Fifth Circuit observed that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and [I] think Section 703 of Title VII was aimed at the eradication of such noxious practices." *Id.* at 238.

Although the reference to "psychological well-being" can describe a level of severity or pervasiveness sufficient to establish hostile environment liability, it does not require, and did not require in *Rogers*, that the plaintiff must necessarily have suffered serious psychological injury. The Fifth Circuit properly recognized that offensive epithets could adversely affect the mental and emotional well-being of individuals to whom the epithets are directed. See *Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich.L.Rev. 2320, 2336, n.84 (1989) (describing the physiological and psychological effects of racial harassment including difficulty breathing, hypertension, alcoholism, social withdrawal, chronic depression, and anxiety neuroses).

Although this Court, in *Meritor*, quoted from *Rogers*, it did not focus on psychological harm as a necessary element of proof. Rather, the Court recognized that sexual harassment could have the same consequences as other forms of harassment and, thereby, alter the employment conditions of its victim.

D. The Equal Employment Opportunity Commission Has Rejected *Rabidue's* Requirement of Serious Psychological Injury.

The EEOC issued an extensive Policy Guidance on Current Issues of Sexual Harassment in 1990. The Guidance was issued in view of this Court's decision in *Meritor* and subsequent sexual harassment decisions in the lower courts. EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, (1989-91 Transfer Binder) CCH Employment Practices ¶5258 at 6921 (March 19, 1990).¹⁰

In the *Policy Guidance*, the EEOC specifically rejected the serious psychological injury requirement established in *Rabidue*. The EEOC reasoned that it should be sufficient to show that the harassment was unwelcome and would substantially affect the work environment of a reasonable person. EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, (1989-91 Transfer Binder) CCH Employment practices ¶5258 at 6928, n.20 (March 19, 1990).

E. *Rabidue* is Inconsistent With the Policy Objectives of Title VII.

The *Rabidue* rule requiring that a plaintiff to have actually suffered serious psychological injury is fundamentally at odds with the policy objectives of Title VII. The primary objective is prophylactic: to achieve equality of employment and remove barriers that have operated in

¹⁰ Although not controlling, EEOC Guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort . . ." *Meritor Savings Bank v. Vinson*, 477 U.S. at 65 (1986).

the past in favor of a preferred group of employees. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971)). Stated differently, the primary purpose of Title VII is to prevent economic and noneconomic injuries that may result from unlawful discrimination on the basis of race, sex, religion or national origin. *Meritor* is grounded in the prophylactic objective of Title VII because the Court recognized that Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Savings Bank v. Vinson*, 477 U.S. at 65 (1986).

Rabidue's serious psychological injury criterion is inconsistent with the prophylactic objective of Title VII because it requires a victim of sexual harassment to prove that she actually endured and suffered severe anxiety or debilitation in order to establish liability in a hostile environment case. Under *Meritor*, however, Title VII's prophylactic objective comes into play long before the point where victims of noneconomic discrimination require psychiatric treatment or have actually suffered anxiety or debilitation. See *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

The EEOC recognizes that the prophylactic objective of Title VII is particularly necessary in sexual harassment cases. As stated in its regulations,

Prevention is the best tool for elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees

of their rights to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

EEOC, *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11(f) (1992). Under the EEOC's view, the prophylactic purpose of Title VII is best served by an employer having a policy against sexual harassment, the policy being effectively communicated to all of the employees, the employer establishing an effective process through which employees affected by sexual harassment can seek redress, and the development of effective sanctions for employees found to have violated its policy against sexual harassment. EEOC, *Guidance on Current Issues of Sexual Harassment*, (1989-1991 Transfer Binder), CCH Employment Practices ¶5258 at 6936 (March 19, 1990). The courts have found that the prophylactic objective of Title VII, as found in the EEOC's regulations, imposes an affirmative duty on employers to take steps so that employees are not subjected to psychological injury as a result of sexual harassment. See *Stoehmann Bakeries v. Local 776*, 969 F.2d 1436, 1441-42 (3d Cir. 1992) (in addition to well-defined public policy against sexual harassment, there is a dominant public policy favoring voluntary employer prevention and application of sanctions against sexual harassment); *Davis v. Tri-State Mack Distributors, Inc.*, 981 F.2d 340, 343-44 (8th Cir. 1992) (failure of employer to have a policy against sexual harassment critical in finding employer liable); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (harassment ended after remedial action taken).

Rabidue's failure to effectuate the objectives of Title VII is forcefully illustrated in this case. Ms. Harris' unrebutted

testimony is that she was embarrassed by Mr. Hardy's conduct; she cried a great deal, she was having shortness of breath, she would get drunk every night so she could get enough sleep to go back to a work environment that was fraught with sexual intimidation, sexual ridicule, and sexual insults; she hated to go to work, and when she did, she would frequently sit in her office and shake; she suffered anxiety; she had to take tranquilizers and sleeping pills; and she was ugly to her children. (Pet. for Cert. App. A-10); (J.A. 52-53, 56). Even in the face of the devastating effects that Mr. Hardy's sexually vulgar and demeaning conduct had on the conditions under which Ms. Harris worked, the magistrate found it insufficient to satisfy the *Rabidue* serious psychological injury standard.

The *Rabidue* rule of serious psychological injury also frustrates the application of Title VII to remedy egregious sexual harassment in the workplace directed towards women. Faced with sexually abusive workplace conduct, a common reaction of women is to leave that workplace for another. Women choose to leave the workplace to avoid the disgust and degradation of sexual harassment. Barbara Gutek, *Sex In The Workplace*, 73-74 (1985). As some courts have recognized, the sexual harassment of women is, *per se*, psychologically harmful. See *Ellison v. Brady*, 824 F.2d 872, 880 n.15 (9th Cir. 1991) (quoting study of effects of sexual harrassment); see also, *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1275, n.3 (7th Cir. 1991) (the harmful effects of racist speech are well documented). Leaving a workplace imbued with sexually derogatory conduct may appear to some women to be the path of least resistance. However, because those women may not have already suffered serious psychological injury at the

time they leave the workplace, the *Rabidue* rule would preclude, for them, a finding of hostile environment liability. While leaving an offensive work environment may be an appropriate means of self-protection, the effect of the *Rabidue* rule is to render such work sites immune to Title VII relief. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

Finally, the *Rabidue* rule imposes a proof requirement in the hostile environment cases that is not applicable in other Title VII claims. None of the Title VII cases decided by this Court, not involving hostile environment, have required plaintiffs to prove psychological injury to establish a violation. It is not required in cases involving the failure to hire. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 793 (1973). It is not required in the discharge cases. See *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976). It is not required in the disparate impact cases. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The reason proof of serious psychological injury is not required to establish a violation in Title VII cases is that it would be contrary to the prophylactic objective of the Act, and inconsistent with the focus of Title VII on the conduct of the alleged perpetration of discrimination as discussed Argument II, *supra* 27-44. See generally, B. Glen George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73. B.U.L. Rev. 1 (1993) (Sexual harassment claims should be treated the same as other claims under Title VII.)

II. THE COURT BELOW ERRED IN DISMISSING MS. HARRIS' HOSTILE ENVIRONMENT CLAIM.

The *Meritor* test for hostile environment liability requires that the challenged conduct be evaluated with respect to its severity or pervasiveness. This Court has not addressed the manner in which evidence on severity and pervasiveness should be considered. The magistrate incorporated into his analysis below both a reasonable person standard, which Ms. Harris submits is an inappropriate basis upon which to judge hostile environment cases, and a reasonable victim standard.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), has been interpreted by the courts of appeals to require some standard in determining whether conduct of a sexual nature is "sufficiently severe or pervasive to create an abusive working environment".¹¹ The rationale for a reasonableness standard is based on an accommodation of competing interests. The first interests are those of the employees Title VII was intended to protect. In enacting Title VII, Congress made a policy decision to eliminate, as

¹¹ The courts of appeals considering whether a work environment was sufficiently severe or pervasive to constitute an abusive working environment have generally applied an objective standard of reasonableness to consideration of the work environment. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3rd Cir. 1990); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). But see, *Ellison v. Brady*, 924 F.2d 872, 877-78 (9th Cir. 1991) (no subjective component to analysis of environment)

a condition of employment, the requirement that individuals run a "gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (citation omitted), and to provide "employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult, *Id.* at 65 (citation omitted). The second interest is to protect employers from having to accommodate the idiosyncratic concerns of the hypersensitive employee. *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 ("mere utterance of ethnic[,], racial [or sexual] epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to a sufficiently significant degree to violate Title VII) (citations omitted)); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3rd Cir. 1990); *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

Although the courts of appeals have applied a reasonableness standard, they disagree on the critically important issue of whose perspective should control: that of the victim or the harasser.¹² Under Ms. Harris' reading

¹² In *Rabidue*, the perspective of the harasser was characterized as a reasonable person standard. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). Several post-*Rabidue* Sixth Circuit hostile environment cases relied on the reasonable victim perspective adopted by the dissenting judge in *Rabidue*. See *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (sexual harassment should be viewed from the victim's perspective); *Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 350 (1988), cert. denied, 490 U.S. 1110 (1989) (reasonable victim standard applies in racial harassment cases). *Rabidue* is still the law in the Sixth Circuit because the panel in *Davis v. Monsanto* simply held that *Rabidue* does not apply to

of *Meritor* the appropriate "reasonableness" standard, to determine whether the harasser's conduct of a sexual nature is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment must be that of a reasonable victim in the position of the plaintiff.¹³ In making this determination courts should consider those factors which objectively describe the workplace conduct being challenged from the perspective of the reasonable victim to determine whether it is offensive. A conclusion that the conduct would be offensive to a reasonable victim will give rise to liability if it is also sufficiently severe or pervasive. In the alternative, the severity or pervasiveness of offensive conduct can be viewed from a totality of the circumstances without resorting to any reasonableness standard. Under either approach, the magistrate's findings support the conclusion that judgment should be entered for Ms. Harris.

A. The *Rabidue* Standard of Reasonableness Legitimizes Offensive Societal Stereotypes Title VII is Intended to Remedy.

In *Rabidue*, the plaintiff, a female salaried management employee, claimed that her employer had condoned

racial harassment claims, and the Sixth Circuit affirmed the decision below in this case which had applied the *Rabidue* standard. Moreover, it is well-settled in the Sixth Circuit that a latter panel cannot overrule the decision of an earlier panel on the same issue. See, e.g., *Timmreck v. United States*, 577 F.2d 372, 376 n.15 (6th Cir. 1978), rev'd on other grounds, 441 U.S. 780 (1979).

¹³ For ease of reference, Ms. Harris will use the term "reasonable victim". The term "victim" was inserted by this Court in its statement of the test for hostile environment liability in *Meritor*. *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986).

a hostile work environment because she and other women employees were exposed daily to pictures of nude or partially clad women displayed openly by male co-workers. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 615 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). One poster, which had remained on a wall in the workplace for eight years, showed a prone woman who had a golf ball on her breast with a man standing over her, golf club in hand, yelling "Fore." Plaintiff and other female co-workers were offended by the posters. One of plaintiff's co-managers, a male, had routinely referred to women as "whores," "cunt," "pussy," and "tits;" had called the plaintiff a "fat ass"; and had stated pointedly about the plaintiff that, "[a]ll that bitch needs is a good lay."¹⁴ *Id.* at 624 (Keith, J., dissenting). The district court ruled against plaintiff.

The Sixth Circuit, in a 2-1 decision affirming the lower court, adopted a two-pronged test of reasonableness. The first prong, or the objective prong, requires a plaintiff to prove two things: first, that conduct of a sexual nature which plaintiff claims to be offensive would affect a hypothetical reasonable person's¹⁵ work

¹⁴ "Bitch" means a lewd or immoral woman: a generalized term of abuse. Webster's Third New International Dictionary, 222 (1976) "Lay" means "to copulate". *Id.* at 1281.

¹⁵ The genderless "reasonable person" standard is a fairly recent development because, historically, the standard has been that of a "reasonable man." See generally, Ronald K. L. Collins, *Language, History and the Legal Process, A Profile of the "Reasonable Man,"* 8 Rut.-Cam. L.J. 311, 317 (1977); Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L.J. 1177 (1990).

performance; and second, that the conduct must "seriously" affect the psychological well-being of that hypothetical person. *Id.* at 620. Assuming that the first prong is satisfied, the second prong, or the subjective prong, requires the plaintiff to prove two additional facts: that she was actually offended by the conduct; and second, that she actually suffered some degree of psychological injury as a result of the conduct. *Id.* at 620.¹⁶

The Sixth Circuit test of reasonableness is based upon the culture of the prevailing work environment established well before Title VII became effective:

Indeed, it cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to - or can change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment for female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

Id. at 620-21 (citing 584 F.Supp. 419, 430 (E.D. Mich. 1984)).

Thus, the *Rabidue* culture of prevailing work environment theory of reasonableness legitimates the perspective of the harasser by virtue of the factors the Sixth Circuit

¹⁶ For the reasons set forth in *Infra* Argument I, pp. 18-19, Ms. Harris believes that proof of actual offense will be a necessary element to establish unwelcomeness criteria, but need not rise to level of serious psychological injury.

deemed relevant. These factors include, for example, whether conduct of a sexual nature was the norm in the employer's workplace prior to the employment of the plaintiff, or to use the language of the Sixth Circuit, does the evidence support a finding that a "lexicon of obscenity pervaded the environment of the workplace before and after" the plaintiff was initially employed. *Id.* at 620.¹⁷ The magistrate in this case relied upon culture of prevailing work environment factor in part, in ruling against Ms. Harris because he thought it relevant that "[m]any clerical employees tolerated his [Hardy's] behavior and, in fact, viewed it as the norm and as joking, and that several "clerical employees formerly employed [by Respondent] testified that Hardy's frequent jokes and sexual comments were just part of the joking work environment." (Pet. for Cert. App. A-17, A-18).

The culture of the prevailing work environment theory approved in *Rabidue* requires individuals to assume the risk that they would be subjected to severe or pervasive conduct of a sexual nature when the employer allowed such conduct to take place prior to the time a person is employed. Judge Keith forcefully illustrated the fundamental flaw in the majority's construction of *Meritor* when he stated that "no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of male prerogative." *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 626-27 (1986) (Keith, J., dissenting), cert. denied, 481 U.S. 1041 (1987).

Rabidue requires employees to develop a high threshold tolerance for sexual abuse as a condition of employment because conduct of a sexual nature in the workplace is to be analyzed within the context of a larger society that "condones and publicly features and commercially exploits open displays of written and pictorial erotica at newsstands, on prime-time television, at the cinema, and in other public places." *Id.* at 622. The magistrate appears to have been substantially influenced in his ruling by this consideration because he found that female clerical employees of Forklift, but not Ms. Harris, had been "conditioned" to accept denigrating treatment (Pet. for Cert. App. A-18).

A standard of reasonableness based upon the perspective of the harasser allows a court to minimize the adverse effect that sexually derogatory conduct may have in creating a hostile environment for plaintiffs. Thus, although the majority in *Rabidue* found that the harasser in that case, Henry, was an "extremely vulgar and crude individual," the court minimized the effect on his conduct on the plaintiff by stating that the nude posters and Henry's remarks, "although annoying, were not so startling as to have affected seriously the psyches of the plaintiff and other female employees." (*Id.* at 622). Similarly, although the magistrate found Mr. Hardy, in this case, to be "a vulgar man" who "demeans the female employees at his work place (Pet. for Cert. App. A-14), he concluded that "Hardy's comments cannot be characterized as much more than annoying and insensitive" and, therefore, the conduct "was comparable to that in *Rabidue*." (Pet. for Cert. App. A-18, A-19, A-20).

¹⁷ The only other circuit to adopt this view is the Seventh. See *Brooms v. Regal Tube*, 881 F.2d 412 (7th Cir. 1989).

Because it accepts existing offensive sexual stereotypes as the norm, the Sixth Circuit reasonable person standard fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men.¹⁸ See Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv.L.Rev. 1449, 1451 (1984). It is, therefore, an inappropriate analytical tool for the application of a statute intended to eliminate artificial, arbitrary and unnecessary barriers based on sex from the workplace. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). This Court has recognized that stereotypical attitudes about women, when manifested in the workplace, are as much a condition of employment as is true of facially neutral employment practices that have an adverse effect on the employment opportunities of groups protected under Title VII. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (plurality opinion) ("We are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group. . . ."); *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 990-91 (1988); *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 n.17 (1987).

B. Offensive Sexual Conduct Can Be Viewed From the Perspective of a Reasonable Person in the Position of the Plaintiff Under *Meritor*.

A standard which considers objective factors of workplace conduct from the perspective of a reasonable

¹⁸ Studies show that the harasser in the overwhelming majority of cases are males. Barbara A. Gutek, *Sex and The Workplace*, 46 (1985); Susan Estrich, *Sex At Work*, 43 Stan.L.Rev. 813 at 821, 822, n.26-28 (1991).

person in the position of the plaintiff would comport with *Meritor*. This standard appropriately accommodates the competing interests of affording employees the right to work in an environment free from discriminatory intimidation, ridicule and insult and the interest of employers to be free from liability to idiosyncratic employees. See *Meritor Savings Bank v. Vinson*, 477 U.S. at 65 (1986). Three courts of appeals and the EEOC have specifically rejected *Rabidue's* reasonable person standard and have adopted the reasonable victim perspective. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485-86 (3d Cir. 1990); *Burns v. McGregor Electronic Ind.*, FEP Cases (BNA) 592, 594 (8th Cir. March 30, 1993); *Ellison v. Brady*, 924 F.2d 872, 879-80 (9th Cir. 1991); EEOC, *Guidance on Current Issues Of Sexual Harassment*, (1989-91 Transfer Binder) CCH Employment Practices ¶5258 at 6928 (March 19, 1990).¹⁹

Ellison v. Brady, is the leading case supporting the reasonable victim standard. Plaintiff, a female and a federal revenue agent, had been invited to lunch by one of her co-workers, Gray, a male. She accepted the first invitation, but declined two others. Gray then sent her a series of bizarre notes in which he professed his romantic

¹⁹ The Third Circuit has not provided a clear answer the issue of the perspective from which sexually harassing conduct must be viewed. In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), the court recognized that there may be two different perspectives on the questions of welcomed and pervasiveness: the harasser's perspective and the victim's perspective. *Id.* at 898 (citing Judge Keith's dissent in *Rabidue*). But in *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1st Cir. 1990), the court apparently ignored *Lipsett's* "two perspectives" approach and applied the *Rabidue* majority's "reasonable person" standard. *Id.* at 192-93.

interest in her. For example, one of the letters said, "I cried over you last night and I'm totally drained today." *Id.* at 874. In another note he said, in part, "I have enjoyed you so much over these past two months. Watching you. Experiencing you from o so far away." *Id.* Concerned by Gray's unwelcomed conduct, plaintiff complained to her supervisor, who temporarily sent Gray to another job site. Gray, however, continued to write the plaintiff. Ms. Ellison described one letter as "twenty times, a hundred times" weirder than previous correspondence. She became frightened by his persistence in writing her and following her. Upon learning that he would be returning to her work site, plaintiff initiated charges against her employer for not protecting her from Gray's harassment. The district court ruled against the plaintiff on the ground that she had overreacted to Gray's conduct, which it characterized as isolated and trivial. *Id.* at 876.

After closely examining *Meritor*, the Ninth Circuit reversed, holding that the severity or pervasiveness of sexually harassing conduct is to be determined from the perspective of a reasonable victim.²⁰ *Id.* at 880. The court rejected *Rabidue's* hypothetical gender-neutral reasonable person standard on the ground that it tends to systematically ignore the experience of women. Unlike the *Rabidue* reasonable person standard, which is based on a culture of the prevailing work environment, the Ninth

Circuit looked to the social realities, relying on studies showing the women are the primary victims of rape, *Id.* at 879, n.10, and studies documenting the realities of sexual harassment in the workplace, *Id.* at 880, n.15. Thus, in *Ellison*, the court stated that:

... Adopting a [reasonable] victim's perspective ensures that the courts will not sustain ingrained notions of reasonable behavior fashioned by the offender. (citation omitted) Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, "Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women. (Citation omitted).

924 F.2d at 881.

In *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990), two female police officers complained of pornographic magazines being placed in their desks and salacious, lewd and sexually foul language being directed at them and other female officers. The Third Circuit, recognizing that men and women are vulnerable in different ways to conduct of a sexual nature, observed:

Obscene language and pornography quite possibly could be regarded as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barriers of sexual differentiation and abuse. Although men may find these actions harmless and innocent, it is highly possible that women may feel otherwise.

Id. at 1485-86. And in *Burns v. McGregor Electronic Ind.*, 61 FEP Cases (BNA) 592 (8th Cir. March 30, 1993), the Eighth

²⁰ The Ninth Circuit variously characterized its standard as "reasonable woman," *Id.* at 879, or "reasonable victim," *Id.* at 880. The characterizations of "reasonable man" and "reasonable woman" are used to contextualize its standard as *Meritor* instructs.

Circuit reversed a decision of the lower court on the ground that it had not applied the reasonable victim perspective in ruling against a female plaintiff in a sexual harassment case.

The reasonable victim standard is further supported by the reasoning in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), in which the Court, while recognizing that there are real and fictional differences between men and women, construed Title VII as prohibiting the imposition of terms and conditions of employment on "stereotyped impressions about the characteristics of males and females." *Id.* at 707 (citation omitted). Similarly, in *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), the Court upheld a state statute that required employers to grant unpaid pregnancy leave for females on the ground that the statute allows men as well as women to have families without losing their jobs.

Finally, the standard was adopted by the EEOC in 1990. In explaining its view of the reasonable person, the EEOC stated that:

The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Equal Employment Opportunity Commission believes that a workplace in which sexual slurs, display of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant. (Emphasis added); (citation omitted).

EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, (1989-91 Transfer Binder), CCH Employment Practices ¶5258 at 6929 (March 19, 1990).

In evaluating hostile work environment claims, the Equal Employment Opportunity Commission suggests that the following factors, among others, be considered:

1. Whether the conduct was physical or verbal;
2. Frequency of the conduct;
3. Whether the conduct was hostile or potentially offensive;
4. Whether the harasser was a co-worker or supervisor;
5. Whether others joined in the harassing conduct; and
6. Whether the conduct was directed at more than one individual.

Id. at ¶5258 at 6928.

Similar factors have been suggested by numerous commentators. Kathryn Abrams, *Gender Discrimination and Transformation of Workplace Norms*, 42 Vand.L.Rev. 1182, 1211-13 (1989); Patricia Linenberger, *What Behavior Constitutes Sexual Harassment*, 34 Lab. L. J. 238, 246-247 (1982); see Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv.L.Rev. 1449, 1458-1459 (1984).

Consideration of objective factors of sexually offensive workplace conduct from the perspective of a reasonable victim in the position of the plaintiff protects

employers from the claims of hypersensitive claimants. It is already clear from *Meritor* that sexual conduct must be considered in terms of its frequency and quality. However, it is conceivable that even "the mere utterance of an epithet" could be viewed as highly offensive by a particularly sensitive individual. Consideration of sexual conduct from the perspective of a reasonable victim would provide legal foundation for the determination that the utterance of an epithet does not alter the conditions of employment. The reasonable victim standard directs courts to consider the offensiveness of workplace conduct in the context of the interests protected by Title VII and notions of common decency.²¹ The reasonable victim perspective can also take into consideration the different experiences of men and women as victims of harassment. Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Reasonableness Standard and Sexual Harassment* 99 Yale L.J. 1177 (1990). The efficacy of this standard in resolving hostile environment claims is demonstrated by its application by at least two courts of appeals. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Burns v. McGregor Electronic Ind.*, 61 FEP (BNA) Cases 592 (8th Cir. March 30, 1993).

C. Proof That Offensive Conduct Altered a Plaintiff's Working Conditions Can Also Satisfy the *Meritor* Test Without Resort to Any Reasonableness Standard.

The legal conclusion that an employee's working conditions have been altered by severe or pervasive sexual conduct could also be satisfied by consideration of an employee's testimony and other relevant proof regarding the offensive conduct without resorting to any reasonable person standard. Courts would still have to focus on the objective factors describing the workplace conduct and avoid consideration of those sexually offensive societal stereotypes Title VII is intended to remedy.

Such an approach would be consistent with *Meritor*, and the policy objectives of Title VII. *Meritor* requires a showing that offensive sexual workplace conduct be sufficiently severe or pervasive to alter the conditions of employment. *Meritor* neither requires any reasonableness standard nor precludes consideration of relevant proof regarding how a plaintiff perceived or felt about the workplace conduct. The trier of fact would determine whether the plaintiff's allegations that the conduct was sexually offensive are credible and, in conjunction with other proof, establish that the severity or pervasiveness test is met. The "unwelcomeness" criterion and consideration of the totality of the circumstances would filter out those claims which are insufficient to meet the test of liability.

²¹ Neither Charles Hardy nor a former Forklift employee, David Thompson, would allow their wives to be subjected to the behavior that Charles Hardy imposed on Ms. Harris at Forklift. (J.A. 98; J.A. 233).

D. Ms. Harris is Entitled to Relief on Her Hostile Environment Claim Based on the Magistrate's Factual Findings.

Applying either the perspective of a reasonable victim or the severity or pervasiveness test to the magistrate's factual findings, Ms. Harris is entitled to judgment on her hostile environment claim.

On the critical issue whether Mr. Hardy's conduct altered the conditions of Ms. Harris' employment and created an abusive working environment, the magistrate made a number of critical factual findings in her favor.²²

The magistrate found that Ms. Harris, a rental manager for Forklift, "was the object of a continuing pattern of sex-based derogatory conduct," emanating from and fostered by Mr. Hardy, and that she was "genuinely offended" by this pattern of conduct of a sexual nature. (Pet. for Cert. App. A-19).²³ The magistrate found that Mr. Hardy, Forklift's President, is a "vulgar man who demeans female employees at his workplace." (*Id.* at A-14).

Mr. Hardy's sex-based and sexual comments undermined Ms. Harris' authority as a manager, particularly so when he made "demeaning sexual comments" to Ms. Harris in front of her co-workers. (*Id.* at A-14). Mr. Hardy's comment suggesting that Ms. Harris promised

²² The magistrate found that Ms. Harris had proved each of the other elements of her hostile environment claim. (Pet. for Cert. App. A-17, A-18).

²³ See Statement of the Case, *infra*, pp. 2-10 for a complete recitation of the magistrate's factual findings and evidence in the record which support those findings.

sexual favors to a customer in order to secure an account was "truly gross and offensive." (*Id.* at A-19).²⁴

Ms. Harris' undisputed testimony was that, as a result of Hardy's conduct, she experienced anxiety, was emotionally upset, cried frequently, began drinking heavily, and her relationship with her children became strained. (*Id.* at A-10). She hated going to work and when at work would sit in her office and shake. (J.A. 53).

Forklift had no sexual harassment policy in effect during the time of Ms. Harris' employment. (J.A. 23). Ms. Harris met with Mr. Hardy in August, 1987, to confront him about his sexually abusive conduct. She intended to resign at that time but did not do so after Mr. Hardy apologized and promised Ms. Harris that his offensive conduct would stop. (Pet. for Cert. App. A-10); (J.A. 57-58). Shortly after the August meeting, however, Mr. Hardy's sexually offensive comments resumed. It was after Mr. Hardy promised to stop his offensive behavior that he made the "truly gross and offensive" remark to the effect that Ms. Harris had promised sexual favors to a customer in order to secure an account. (*Id.* at A-10). At that moment, Ms. Harris knew that Mr. Hardy would not change and his behavior would not stop. The only way she could escape his offensive conduct was to leave her employment. The magistrate's factual findings, when considered in their totality, mean that Ms. Harris had convinced the factfinder that a reasonable person in the

²⁴ For some unexplained reason, the magistrate believed that this offensive comment, made in the presence of Ms. Harris' co-workers, was less significant since it was not made in the presence of a customer. (Pet. for Cert. App. A-19).

position of the plaintiff would have been offended by Mr. Hardy's conduct and that she had been offended by Mr. Hardy's conduct.

Not all the comments and actions of Mr. Hardy directed towards women at Forklift, generally, and at Ms. Harris, in particular, were "truly gross and offensive". However, Mr. Hardy's conduct must be looked at in total, not in piecemeal fashion. *Vance v. Southern Bell Telephone Telegraph*, 863 F.2d 1503, 1504 (11th Cir. 1989). In addition, the comments and conduct should be evaluated in terms of their frequency and offensiveness. See, *Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988), cert. denied, 490 U.S. 1110 (1989).

The magistrate's findings support the conclusion that Mr. Hardy's conduct was both severe and pervasive and altered the conditions of Ms. Harris' employment. Forklift imposed upon Ms. Harris as a condition of her employment, that she be subjected to a continuing pattern of derogatory sex-based conduct emanating from and fostered by Mr. Hardy. The conditions under which Ms. Harris had to work were precisely those condemned by the court in *Mentor*: Ms. Harris had to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living". *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986), quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982). Because the factual findings of the magistrate support the conclusion that Mr. Hardy's conduct altered Ms. Harris' working conditions and created an abusive sexual environment, under either the reasonable victim standard or the severe and pervasive standard, the decision below dismissing her hostile environment claim should be reversed.

III. THE LOWER COURT ERRED IN REJECTING MS. HARRIS' CONSTRUCTIVE DISCHARGE CLAIM.

Ms. Harris also sought relief under the constructive discharge theory. (J.A. 20). The magistrate rejected her claim on two grounds. First, he held that *Rabidue* was controlling on the constructive discharge claim. Under the magistrate's view, proof of serious psychological injury was necessary to support a claim of constructive discharge. Because he had ruled that Ms. Harris had not suffered serious psychological injury he dismissed her constructive discharge claim. (Pet. for Cert. App. A-21). Second, the magistrate relied upon a line of Sixth Circuit decisions, see *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987) (collecting Sixth Circuit cases), holding that an employee seeking relief in a constructive discharge in a hostile environment case must show that a reasonable person in the position of the plaintiff found conditions so intolerable or unpleasant that she would feel compelled to quit (Pet. for Cert. at A-21). *Yates* also requires that the following additional elements be proven beyond a finding of unlawful discrimination: (1) aggravating factors; (2) intentional conduct on the part of the employer; and (3) foreseeability by the employer that its conduct would cause a reasonable person to terminate the employment relationship. *Yates v. Avco Corp.*, 819 F.2d at 637 (6th Cir. 1987). Because the magistrate concluded that Mr. Hardy's conduct was merely annoying, his resumption of the offensive conduct neither reflected Forklift's intent to force Ms. Harris to quit, nor was it foreseeable she would quit upon resumption of the conduct. (Pet. for Cert. App. A-21, A-22).

The magistrate's dismissal of Ms. Harris' constructive discharge claim should be reversed for several reasons. First, to the extent the magistrate found that *Rabidue* was dispositive of Ms. Harris' constructive discharge claim, his dismissal should be reversed for the reasons stated in Arguments I and II, *supra*, pp. 12-44. Second, the *Yates* elements (aggravating factors, intent, and foreseeability) are not appropriate in hostile environment cases.²⁵

The principal error committed by the magistrate was his failure to comprehend the relationship between the quid pro quo and hostile environment theories of sexual harassment. A hostile environment claim also supports a quid pro quo claim if conduct of a sexual nature becomes so intolerable that a reasonable person in the position of the plaintiff would feel compelled to quit. The inquiry of whether conditions were intolerable, however, should not focus on the severity or pervasiveness of the conduct: that issue has already been determined through a finding of liability on the underlying hostile environment claim.

²⁵ Decisions from other circuits reflect similar confusion regarding constructive discharge liability in hostile environment cases. Some circuits focus on the employee's state of mind; that is, whether the hostile conditions were so intolerable to require the employee to leave. *Vaughn v. Pool Offshore Oil*, 863 F.2d 922, 926 (5th Cir. 1982); *Huddleston v. Roger Dean Chevrolet* 845 F.2d 900, 905 (11th Cir. 1988). At least one circuit focuses on the intent of the employer in the context of the remedy offered. *Paroline v. Unisys Corp.* 878 F.2d 100, 108 (4th Cir. 1990). The development of the constructive discharge theory in Title VII jurisprudence is discussed in Note, *Choosing A Standard for Constructive Discharge in Title VII Litigation*, 71 Cornell L. Rev. 587 (1986).

Harassment becomes "intolerable" if there is no end in sight: if there is no reason to believe it will ever cease. The EEOC has taken the position that if an employee leaves employment due to a hostile work environment and the employer did not have a sexual harassment policy and an effective internal grievance procedure the claim will also become one of quid pro quo. EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, (1989-91 Transfer Binder), CCH Employment Practices ¶5258 at 6931 (March 19, 1990). The failure of an employer to have an effective internal grievance procedure means that it would be reasonable for a sexually harassed employee to choose to quit rather than endure the continuing harassment which has altered the conditions of her employment. *Id.* at 6931, 6934; see *Wheeler v. Southland Corp.*, 875 F.2d 1246 (6th Cir. 1989) (reasonable for employee to quit when not informed of employer's remedy to hostile environment).

The test for a constructive discharge claim, after a sexually hostile work environment has been found, should, therefore, focus on the internal remedies available to the employee which would eliminate the offensive conduct. The first inquiry should be whether the employer has an established company policy proscribing sexual harassment and an effective grievance procedure for sexually harassed employees. If there is not an effective policy or procedure, constructive discharge should be found. If there is a policy or procedure, the next inquiry should be whether the employee made use of the procedure. If the employee did not make use of the procedure, constructive discharge should not be found. Unless the employee attempts to make use of an available

remedy, the coercive element of quid pro quo harassment is lacking. See *Brown v. Regal Tube*, 881 F.2d 412, 423 (7th Cir. 1989) (employee must seek redress). If the employee made use of the procedure, the final inquiry should be whether the employer made a legitimate effort to eliminate the harassment. See *Paroline v. Unisys Corp.*, 879 F.2d 100, 109 (4th Cir. 1989) (remedy must correct hostile environment). Of course, the employee can challenge the remedy as pretextual or ineffective. This test for constructive discharge liability comports with Title VII's objective to eliminate discriminatory practices in the workplace.

The requirements for constructive discharge liability in *Yates*, on the other hand, impose unwieldy inquiries into the employer's intent and the foreseeability of the employee leaving the workplace. These requirements do nothing to foster the elimination of sexually offensive conduct in the workplace.

The relationship between quid pro quo and hostile environment claim and the application of the proposed test for constructive discharge liability is aptly illustrated in this case. The magistrate found that Mr. Hardy had engaged in vulgar and demeaning conduct of a sexual nature toward female employees, and specifically, Ms. Harris. Forklift had no sexual harassment policy or established grievance mechanism. Ms. Harris, who was offended by the conduct, confronted Mr. Hardy in August, 1987 with the intention of terminating the employment relationship. She had made the decision to terminate her employment because Mr. Hardy's conduct had altered the conditions of her employment such that she hated to come to work. After Mr. Hardy apologized and promised to stop, Ms. Harris did not resign as she

had intended, based on his assurance. However, when Mr. Hardy again began to engage in similar conduct, it became clear to her that submission to sexually vulgar and demeaning conduct would continue to be a condition of employment. She, therefore, felt compelled to terminate the employment relationship. Absent any formal policy, Teresa Harris took the initiative to speak with her boss who was also the perpetrator of the conduct of which she was complaining. Mr. Hardy and Ms. Harris spoke about her complaint and Mr. Hardy offered a remedy: he said he would stop; a remedy which would have been satisfactory to Teresa Harris. However, the remedy was illusory because the harassment continued. Faced with an ineffective remedy, Teresa Harris had no choice but to leave her employment and, thereby, lost a tangible economic benefit.

Because the dismissal of Ms. Harris' hostile environment claim was based on the application of the wrong legal standard, the decision below dismissing Ms. Harris' constructive discharge theory should also be reversed.

CONCLUSION AND PRAYER

For reasons stated above, the judgment below should be reversed. Proof of serious psychological injury is not required to conclude that a hostile environment based on sex exists. To require such proof is contrary to the remedial purposes of Title VII. Sexual conduct in the workplace, which is severe or pervasive, violates Title VII if it would be offensive to a reasonable victim or is supported by credible proof of severity and pervasiveness without

any consideration of reasonableness. The court below made adequate factual findings to conclude that the conduct Ms. Harris endured at Forklift was sufficiently pervasive or severe to alter the conditions of her employment and create an abusive work environment. The factual findings of the magistrate and undisputed facts below also support Ms. Harris' claim that she was constructively discharged.

Respectfully submitted,

IRWIN VENICK
(Counsel of Record)
WOODS & VENICK
A Professional Law Assn.
121 17th Avenue, South
Nashville, TN 37203
(615) 259-4366

LARRY WILSON
110 30th Ave. N., Ste. 1
Nashville, TN 37203
(615) 320-5940

ROBERT BELTON
REBECCA L. BROWN
ANNE M. COUGHLIN
Vanderbilt Law School
Nashville, TN 37240
(615) 322-2615
Counsel for Petitioner